PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

BILLS AND NOTES.

Pennsylvania, in opposition it seems to the general weight of authority, has held that a certificate of deposit is not a negotiable instrument: *London Sav. Fund Soc.* v. *Hagerstown Sav. Bank*, 36 Pa. 498. In *Bank of Saginaw* v. *Title and Trust Co. of Western Pennsylvania*, 105 Fed. 491, the United States Circuit Court for the Western District of Pennsylvania holds this a ruling upon a point of general commercial law, and under the principle of *Swift* v. *Tyson*, refuses to follow it, but holds such certificate negotiable.

Certificates of Deposit Negotiability

The statute of Indiana makes contracts in consideration of a gambling debt void. The well-settled rule that a note given on such consideration is *void* even in the hands of a *bona fide* holder for value, is applied in the case of *Irwin* v. *Marquett*, 59 N. E. 38, but this is immediately followed by a decision allowing a recovery on such a note, on the ground that the indorser of a note before purchasing it had taken it to the maker and asked whether it was all right, and the maker had not indicated that he had any defence to it, and that such conduct estopped him from setting up its invalidity: *Pritchett* v. *Ahrens*, 59 N. E. 42.

Consideration Gambling Debt, Estoppel

A note and mortgage were executed by a wife and delivered to the payee of the note, on consideration that he would cease to prosecute and would settle a criminal offence, for the commission of which the husband was at the time under arrest on a warrant sued out by such payee. In *Jones* v. *Dannenberg Co.*, 37 S. E. 729, the Supreme Court of Georgia holds that this may be pleaded and proven as a defence to the foreclosure of the mortgage so given, even in the hands of one who was the *bona fide* holder of such note for value, before due and without notice.

Suppression of a Prosecution

In *Dils* v. *Bank of Pikeville*, 60 S. W. 715, accommodation indorsers of a note made payable to themselves sought to

BILLS AND NOTES—(Continued).

Agreement to Procure Additional Indorser

escape liability thereon on the ground that it was delivered on condition that another indorser should be secured thereon. The Court of Appeals holds this no defence to an action on the note, since it was delivered on this condition to the payee, and not to the principal obligor, and the court denies the possibility of a delivery in escrow of negotiable paper to the payee. The defendant, it is said, may recover damages for breach of the agreement.

BOYCOTT.

The authorities which allow an injunction or damages for interfering with an individual's right of contract "all expressly

Injunction, Damages

turn upon the fact that there was coercion, intimidation, or malicious threats to do an unlawful injury." So the Court of Appeals of Colorado holds in *Master Builders' Assn.* v. *Domascio*, 63 Pac. 782, and consequently refuses to give either an injunction or damages where a letter was sent to architects of a building signed by members of a master builders' association, in which they declined to bid on the building if plaintiff's bid should be received in competition.

CONSTITUTIONAL LAW.

In *Fox* v. *Mohawk and H. R. Humane Soc.*, 59 N. E. 353, the Court of Appeals of New York holds that the summary

Dog Licenses, Due Process of Law

appropriation of a dog for non-payment of a tax imposed, without notice to the owner, is not a taking a property without due process of law. The court refers to the doctrine of qualified property only existing in such animals and says that "there may be said to be no property in them against the police power of the state," but admits that such legislation in regard to domestic animals, such as horses, oxen and the like, would be unconstitutional.

The constitution of Indiana required a "majority" of the "electors" to ratify an amendment to the constitution. This,

Majority of Electors

the Supreme Court of the state, *In re Denny*, 59 N. E. 359, holds, means more than half of those qualified to vote at the time the vote was taken. Justice Jordan vigorously dissents, and in an elaborate opinion, in which he refers to numerous authorities of various states, strongly supports his position that the language means a "majority of those who exercise the right of suffrage," and should include merely those who voted on the proposition. It is interesting to note that the question arose in consequence

CONSTITUTIONAL LAW (Continued).

of an effort to change the constitutional provision that "every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice," and to place the regulation of qualifications in the hands of the legislature. There were 240,031 for the change, 144,072 against it, but it appearing that there were more than twice 240,031 electors, the court held the amendment not adopted.

CONTRACTS.

Rescission, Fraud, Retaining Benefits

In *Hagartine-McKittrich Dry Goods Co.* v. *Swofford Bros. Dry Goods Co.*, 68 Pac. 281, it appeared that the mercantile company, plaintiff in error, in consideration of the surrender to it of large valuable property rights, upon a part of which it had a mortgage, had assumed and agreed to pay the mercantile indebtedness of the mortgagor. On this contract it was sued by a creditor of the mortgagor. It set up as a defence fraud on the part of the mortgagor, but it appeared that it continued in possession of the property. Under these circumstances the Court of Appeals of Kansas holds it cannot repudiate its agreement to pay mercantile creditors. Two courses, it is said, are open to it: to repudiate the whole transaction and restore the *status quo* and be relieved of all obligation on the contract, or to affirm the contract, bear the obligations and have recourse upon the mortgagor for damages sustained by his fraud and deceit.

Subscription, Several Obligation

On a contract with an unincorporated association for the erection of a creamery the party undertaking to build sought to recover from some of the associates for unpaid subscriptions. It appeared that fifteen of the subscribers had limited their liability by fixing the amounts of their several subscriptions in all $1,700. Eleven did not fix these amounts. The stipulated contract price was $3,000. In *Cornish* v. *West*, 84 N. W. 750, the Supreme Court of Minnesota acknowledges its inability to find precedents, but holds the liability of the eleven last mentioned to be several and not joint, and that each was bound to pay one-eleventh of $1,300.

Option to Purchase

The well-known rule that an attempted acceptance, varying materially the terms of an offer, not only does not bind the contract, but even operates as a rejection of the offer, was held in *McCormick* v. *Stephany*, 48 Atl. 25, not to apply to the case where a man had granted an option to a lessee to purchase the demised premises, and the

CONTRACTS (Continued).

lessee had demanded a greater conveyance than this allowed him. The Court of Chancery of New Jersey proceeds on the ground that the option is not a mere offer, but that it is "a completed purchase of a right to have a conveyance if the purchaser shall choose to buy upon the terms named."

Postponement of Payment, Consideration

The Supreme Court of Oneida County, N. Y., holds in *Goldman* v. *Ehrenreich*, 68 N. Y. Supp. 424, that where a debtor offers to pay an installment due, but is told by the creditor that he does not want the money, and that the payment may be deferred a year, and the debtor, acting on this proposition, does not pay the installment, but uses the money for other purposes, such conduct amounts to an agreement to postpone payment for a year. The desire of the creditor to have his money remain invested is a sufficient consideration for the agreement. Apart from this the creditor is estopped by his conduct from demanding payment before the expiration of the year.

Termination by Death

A contest arising in consequence of the death of Augustin Daly appears in *Strauss* v. *Daly*, 68 N. Y. Supp. 597, in which an effort is made to recover against Daly's executors on a contract made with him, by which he granted the exclusive right to furnish the programs of the theatre for three years, the size of the programs to be determined by the manager. He died before the commencement of the period, and his executor disposed of the theatre. The Supreme Court, Appellate Division, First Department, holds his estate not liable, on the ground that the contract was made on the implied condition of the continued existence of the parties. But the contract having been assigned recovery is allowed to the assignee for the amount paid Daly upon the execution of the contract.

Breach, Defence of Illegality

A New Jersey corporation, engaged in the business of indemnifying against losses on credits, contracted with the plaintiff that he should act as its agent in Massachusetts for a term of years, and forthwith the plaintiff entered upon his duty as such agent. During the prescribed term the corporation became insolvent, and for that reason the contract was broken. When the agent had begun his work, the Insurance Commissioner of Massachusetts had decided that it was lawful for him to do so, but later the Supreme Court of Massachusetts decided the business to be unlawful in the state. The plaintiff sued for a breach of the contract, and the defendant corporation set up

CONTRACTS (Continued).

these facts as a defence. In *Rosenbaum* v. *U. S. Credit-System Co.*, 48 Atl. 237, the Court of Errors and Appeals of New Jersey holds that such illegality is no defence to the plaintiff's suit, but can only affect the extent of the recovery. Chief Justice Magie, with whom concur two other justices, dissents on the ground that "damages for being prevented by the insolvency of the company from procuring contracts which the company had no lawful authority to make cannot be recoverable."

Restraint of Trade

The Court of Appeals of New York, in *Wood* v. *Whitehead Bros. Co.*, 59 N. E. 357, holds valid a contract "to give up the business of dealing in molding sand obtained from sandbanks in the county of Albany," although unaccompanied by the sale of any business, plant or stock. The strict doctrine against such agreements, the court says, "had its origin at a time when the field of human enterprise was limited, and when each man's industrial activity was more or less necessary to the material well-being and welfare of his community and of the state." The rule was founded on public policy, and "the conditions which made so rigid a doctrine reasonable no longer exist." "Contracts which have for their object the removal of a rival and competitor in a business are not to be regarded as contracts in restraint of trade. They do not close the field of competition except to the particular party to be affected." The facts of the case hardly necessitate such broad language, but its use, in view of modern economic tendencies, is significant.

CORPORATIONS.

Transfer of Franchise

The transference by a corporation of its franchises except under permission of the law is held, in *Simonds* v. *East Windsor Electric Railway Co.*, 48 Atl. 210 (Conn.), to be such a breach of a public trust as will deprive the incorporators of relief in a case like the following: They had transferred the franchise to one A., in consideration that he should build the railway, and in case of his failure to build it, should retransfer the franchise. A. did fail to build, and specific enforcement of his contract was sought, but was refused, the transaction being regarded as illegal, and equity deciding to let the parties stand as it found them.

DEAD BODIES.

In *Pulsifer* v. *Douglass*, 48 Atl. 118, the Supreme Judicia Court of Maine, admitting that the husband has a right to

DEAD BODIES (Continued).

Rights of Husband

determine the place where his wife's body shall be buried, and to bury it there, holds that when once the dead body has been buried it becomes a part of the ground to which it has been committed, and an action of trespass might be maintained against any one who disturbs the grave and removes the body; at least, so long as the cemetery continues to be used as a place of burial. However, the court says that a court of equity in this country, where there are no ecclesiastical courts, may, under some circumstances, permit the husband to remove his wife's body from the land of another, as where the burial was not with the intention or understanding that it should be her final resting place. On principle, it would seem that this same holding should be had where the burial was without the consent of the husband. The court refers, for a discussion of the law on this subject, to *Pierce* v. *Proprietors of Swan Point Cemetery*, 10 R. I. 227.

HOMICIDE.

Defence of Domicile

The Supreme Court of Nebraska holds in *Thomson* v. *State*, 85 N. W. 62, that the true rule undoubtedly is that a man may defend his domicile, even to the extent of taking life, if it be actually or apparently necessary to prevent the commission of any felony therein. But the court implies that this is not all, for it says: "Whether this is the precise limit of the domiciliary right it is not here necessary to determine; but, if it is the limit, then popular sentiment is not in accord with the law."

HUSBAND AND WIFE.

Separation, Agreement for Support

The line that distinguishes the valid from the invalid contract when husband and wife separate, however clear it may be in theory, is frequently, like so many other rules, not easy to apply to the facts. Thus in *Baum* v. *Baum*, 85 N. W. 122, the plaintiff and defendant agreed to live separate and apart, and the defendant thereupon agreed to contribute sufficient money to support his family and to make an absolute assignment of certain policies of life insurance to his wife. In a suit by the wife for specific performance of the contract to transfer the policies, the Supreme Court of Wisconsin, adverting to the old strictness of the English law on this point and the present laxity thereof (see 1 Bish. Mar. & Div., §§ 1263, 1264), adheres to the strict view and regards the contract in question as against public policy, inasmuch as it tends to a breaking of the marital relation, and therefore void.

JUDGMENTS.

Lien, Tenant's Possession as Notice

In *A. R. Beck Lumber Co.* v. *Rupp*, 59 N. E. 429, it appeared that A. had conveyed land to B. subject to a secret oral trust for himself, but C. was in possession as tenant of A. from the time of the conveyance to B., until B. reconveyed. The Supreme Court of Indiana holds, under these circumstances, that the possession of C. is such notice to judgment creditors of B. as to prevent the lien of their judgments from attaching. The creditors sought to raise the question of the Statute of Frauds to prevent B. from retransferring, but the court holds this a defence personal to B., and having executed the trust, his creditors have no claim.

JURY.

Peremptory Instruction and Return Verdict

The Court of Appeals of Kentucky holds in *Curran* v. *Stein*, 60 S. W. 839, that where a court gives a peremptory instruction for the defendant, it is not error to compel the jury to return a verdict in obedience to the instruction, though a number of the members of the jury protest. "The peremptory instruction of the court to the jury, like any other order the court may make in the case, must be obeyed. The verdict, though in form the act of the jury, is really the act of the court. The court determines the case. The verdict of the jury is merely a form of putting on record the judgment which the court has given."

MALICIOUS PROSECUTION.

Termination of Prosecution

A termination of a prosecution by agreement of defendant and prosecutor is held, in *Craig* v. *Ginn*, 48 Atl. 192, not a sufficient termination to sustain an action for malicious prosecution where the following facts appeared: The accused, on being brought into court, asked for a postponement, but the prosecuting witness refused to consent to any delay, and thereupon an agreement was made postponing a settlement between the accused and the prosecuting witness till the former could produce his accounts, and the prosecution was abandoned, each paying one-half the costs. The case of *Robbins* v. *Robbins*, 133 N. Y. 597, is cited as not supporting this view, but the court regards its decision as in line with the principles of the law.

MORTGAGES.

The implied notice of a record is not, it seems, that knowledge which avoids the effect of a false representation believed

MORTGAGES (Continued).

Representations by Assignor, Estoppel

and acted on. So in *Zeis* v. *Potter*, 105 Fed. 671, the Circuit Court of Appeals, Seventh Circuit, holds that one who sells notes secured by a second mortgage, falsely representing such mortgage to be a first lien, cannot invoke the record of a prior mortgage held by himself as notice to the purchaser, but as between them the purchaser is entitled to priority of lien.

NEGLIGENCE.

The frequency of accidents at railroad crossings naturally tends to the hardening of rules as to what constitutes the standard of due care in such a situation. The Supreme Court of Wisconsin seems not to have come to the strict Pennsylvania view that it is necessary to stop, look and listen, but appears to be rapidly tending in that direction, as is seen in its decision in *Guhl* v. *Whitcomb*, 85 N. W. 142. It is there held that the only diversion of attention which will excuse failure to look and listen before crossing a railway track is where the attention is so irresistibly forced to something else as to deprive a traveler of the opportunity to look and listen.

Duty to Look and Listen

PARENT AND CHILD.

The Supreme Court, Appellate Division (N. Y.), holds, in *People* v. *New York Juvenile Asylum*, 68 N. Y. Supp. 656, that where a mother because of her destitution had surrendered her child to the care of a juvenile asylum for two years, and that asylum has indentured the child to a person in another state, the mother, after the expiration of the two years, will not on application, by a writ of *habeas corpus*, obtain an order for the restoration of the child without giving proof that the child is in the control or custody of the asylum, if such control or custody is denied by the return to the writ. Two of the five judges dissent, on the ground that the asylum must still be presumed to have control of the child, and it is for it to show its physical inability to produce it.

Custody, Habeas Corpus

PARTNERSHIP.

In *Hopkins* v. *Adey*, 48 Atl. 41, the facts showed a loan by one partner to her co-partner, taking a note guaranteed by a co-maker. The money so obtained was applied with the knowledge of the lender to the payment of partnership debts. Soon after the partnership was dissolved, though perfectly solvent. In an action on the note the defence was made that there was no consideration for the note,

Partner's Liability

PARTNERSHIP (Continued).

because the money was applied to the firm's debts, for which the payee was equally not valid. The Court of Appeals of Maryland holds this defence not valid, on the ground that the property of an individual partner is not liable for the firm's debts until his individual creditors have been paid and the firm's assets are exhausted.

RAILROADS.

In Indiana the Employers' Liability Act provides that every railroad or other corporation, except municipal, in the state shall be liable in damages for injury to employes, etc. In *Hunt* v. *Conner*, 59 N. E. 50, the appellate court of that state holds that under this statute an action may be maintained against the receiver of the railroad company, since he, operating the road under the court's control, exercises the franchises of the corporation for the benefit of the corporation and its creditors, and the action is substantially against the corporation in his hands. The court says: "There is some conflict in the decisions, but the greater weight of authority sustains our conclusion."

Action Against Receiver

In Iowa the sounding of the whistle of an engine approaching a crossing and the ringing of its bell are statutory requirements. The Supreme Court of that state holds in *Graybill* v. *Chicago M. & St. P. Ry. Co.*, 84 N. W. 946, that the failure to observe these regulations is negligence, which will warrant a recovery for cattle injured by the failure so to do, as such statutes are not solely for the protection of human beings. And the court regards it the province of the jury to decide whether the "failure so to do" explains why the cattle did not "get out of the way," a rather speculative question, but one not hard for a jury of farmers to answer.

Accident at Crossing, Cattle

"When the employe, in carrying out a purpose of his own, does injury to another, not within the scope of his employment, the employer is not liable." This the Supreme Court of Louisiana lays down as the settled test of when a master is exempt from liability for the acts of his servant, making the *purpose* of the servant the criterion: *Dorsey* v. *Kansas City, etc., Ry. Co.*, 29 Southern, 177. The rule is applied to a case where a man was stealing a ride on a freight car, and the brakeman, seeing him, at once began to pelt him with rocks and clods; and when he attempted to escape he fell under the wheels and was injured. The court holds the railroad company liable, since the servant acted to effect its purpose, not his own.

Trespasser on Train, Violent Removal

SPECIFIC PERFORMANCE.

How far the consideration of public inconvenience will affect the right to specific performance of a contract with quasi-public corporations raises interesting questions. Thus in *Goding* v. *Bangor & A. R. Co.*, 48 Atl. 114, it appeared that there was a contract on the part of a railroad to purchase from a farmer a right of way through his farm and in part consideration therefor to establish at a given point a grade crossing. This contract the farmer sought to have enforced after the construction of the railroad, but specific performance is denied by the Supreme Judicial Court of Maine on the ground that a grade crossing being a place of recognized danger, the public safety and convenience would be injuriously affected, and that this, combined with the fact that the additional burden placed on the railroad would be disproportionate to the benefit to the plaintiff, is sufficient reason for refusing specific performance.

Grade Crossing, Hardship

What constitutes the part performance sufficient to take an oral contract out of the Statute of Frauds and allow specific performance thereof is difficult of application in a case like *Russell* v. *Briggs*, 59 N. E. 303, where two general rules somewhat conflict, viz., the rule that mere payment of the consideration is not sufficient, and the rule that when the acts alleged as part performance indicate a contract *qua* the land in question the contract may be shown. In that case the defendant orally agreed to pay plaintiff for his services in superintending the repair of certain property, procuring tenants, collecting the rents and assisting to find a purchaser therefor, a definite proportion of the land. The majority of the Court of Appeals of New York hold this a contract within the statute, and the acts not such part performance as to take it out. In an elaborate dissenting opinion Chief Justice Parker reviews this branch of the law and comes to an opposite conclusion. His dissent is concurred in by two other justices.

Statute of Frauds, Part Performance

STATUTE OF FRAUDS.

The Statute of Frauds in Rhode Island provides that no action shall be brought on a promise to answer for the debt or default of another person, unless the promise is in writing, signed by the party to be charged. In *Stillman* v. *Dresser*, 48 Atl. 1, the Supreme Court of the state holds that this does not apply where the assignee of claims for services agreed not to enforce the same against the debtor, but to have the amount determined, and then assign them to a third person on his contract to pay for the same. The court

Assignment of Claims

STATUTE OF FRAUDS (Continued).

regards it as an agreement not to answer for the debt of another, but merely to take an assignment of the right, and proceeds on the general principle that where the court will regard the transaction as primarily an assignment the statute does not apply.

STATUTE OF LIMITATIONS.

In *Smith* v. *Blachley*, 47 Atl. 985, the Supreme Court of Pennsylvania holds that the statute commences to run against an action for money obtained by fraud from the time the transaction is completed by the receipt of the money, where nothing is thereafter done by the person receiving it to prevent inquiry and discovery of the fraud. Two widely divergent views, it is said, exist; on the one hand, that the fraud, though complete and fully actionable, operates as of itself a continuing cause of action until discovery; on the other hand, that when the cause of action is once complete the statute begins to run and suit must be brought within the prescribed term, unless some additional and affirmative fraud is done with that intent. The former appears to be the view of the United States courts, while the latter prevails in New York.

Fraud

SURFACE WATERS.

In *Stein* v. *Coleman*, 48 Atl. 206, the Supreme Court of Errors of Connecticut holds that a landowner can neither obtain an injunction nor recover damages, where his neighbor has so built his house and so graded his premises that whenever it rained the water falling thereon flowed onto and through such landowner's premises, washing away the soil and lawn and destroying valuable trees. Every change in an owner's property, it is pointed out, will necessarily change the direction of the drainage, and for this the court refuses to recognize any liability. "But it is not permitted that the owner may accumulate the surface water thereon and by artificial means turn it upon his neighbor's land for the purpose of relieving his own from it." The court seems to regard a roof not an "artificial" means, but that a spout or trough would be, the idea of "accumulation" apparently playing some part.

Draining, Injunction, Damages

TELEGRAPH COMPANIES.

Ever since the case of *Reese* v. *Telegraph Co.*, 123 Ind. 294, the Appellate Court of Indiana has held that an action may be maintained to recover damages for mental anguish arising from failure to deliver a death message. The court reverses this holding and a

Failure to Deliver Message

TELEGRAPH COMPANIES (Continued.)

number of cases which followed it, in *Western Union Telegraph Co.* v. *Ferguson*, 59 N. E. 416. Twenty-six of the courts of last resort in this country and the highest courts of England, it is said, are contrary to *Reese's Case*, and the court proceeds on the general principle that mental pain and anguish cannot themselves constitute a cause of action, though it is admitted that in regard to torts producing mental suffering, such suffering may constitute an element in determining the damages. Several courts still hold the contrary doctrine, among them Tennessee, North Carolina and Alabama.

VOTERS.

Property Qualification

The Constitution of New York provides (Art. 2, § 1) that every male citizen of the age of twenty-one years, possessing the required qualifications as to residence, shall be entitled to vote for all officers elected by the people, and on all questions which may be submitted to the vote of the people. In *Spitzer* v. *Village of Fulton*, 68 N. Y. Supp. 660, the Supreme Court of Oneida County holds that the provision of the charter of Fulton requiring a property qualification of voters, voting on the question of the issue of bonds by the village, was not in conflict with this provision, which was only intended to prescribe the qualification of voters voting on questions submitted to the whole people of the state, and did not restrict the power of the legislature to require other or different qualifications for voters in cities and villages on local matters. The similarity of the constitutional provision to the provisions of the constitutions of other states renders the holding of more than local interest.

WILLS.

Residuary Clause, Right of Legatee

By a testator's will the legatees were "to share" pro rata "in any increase or decrease" that might arise upon the settlement of his estate. He bequeathed $200 each to A. and B., as directed to be paid by the will of his mother. The Surrogate's Court of Winchester County (N. Y.) holds, in *In re Whiting*, 68 N. Y. Supp. 733, that A. and B. may not participate in the residue, though regarding the other legatees as entitled thereto. The ground is that these legacies are not paid by reason of testator's bounty, but in deference to some direction of testator's mother.